

United Food and Commercial Workers Local Union No. 455, AFL-CIO and Gerland's Food Fair, Inc.; Gerland's Food Fair, Inc. d/b/a Gerland's Realty, Inc.; Gerland's Food Pantry, Inc. Case 16-CB-3312

March 29, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND DEVANEY

Upon a charge filed by Gerland's Food Fair, Inc., Gerland's Food Fair, Inc. d/b/a Gerland's Realty, Inc., Gerland's Food Pantry, Inc., the Employer, on March 30, 1989,¹ the General Counsel of the National Labor Relations Board issued a complaint on May 9, against United Food and Commercial Workers Local Union No. 455, AFL-CIO, the Respondent, alleging that the Respondent violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act. Copies of the charge and complaint and notice of hearing were served on the parties. Thereafter, the Respondent filed an answer denying the commission of any unfair labor practice.

On November 3, the parties filed a stipulation of facts and a motion to transfer the case to the Board. The parties agreed that the stipulation of facts and attached exhibits shall constitute the entire record in this case, and that no oral testimony is necessary or desired by any of the parties. The parties further waived a hearing before an administrative law judge, the issuance of an administrative law judge's decision, and indicated their desire to submit the case directly to the Board for findings of fact, conclusions of law, and an Order.

On July 2, 1990, the Board issued its order approving the stipulation and transferring the proceeding to the Board. Thereafter, all parties filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record in the case, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Employer, a corporation with an office and place of business in Houston, Texas, is engaged in the retail sale of groceries and related items. During the 12 months preceding execution of the stipulation of facts, a representative period, the Employer, in the course and conduct of its business operations, derived in excess of \$500,000 gross revenue from the sale of grocery and related items, of which amount valued over \$50,000 was purchased and received at its Houston fa-

cilities directly from points outside the State of Texas. We find that the Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. We further find that the Respondent is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The issues presented are whether the Respondent violated Section 8(b)(1)(A) by refusing to honor the request of seven employees² to revoke their previously executed dues-checkoff authorizations after they resigned union membership, and violated Section 8(b)(2) by demanding that the Employer deduct union dues from the employees' wages after the employees resigned.

A. Facts

The Respondent is the exclusive representative of the employees in the following appropriate bargaining unit:

INCLUDED: All employees in the retail stores owned and operated by the Employer located in the Texas counties of Harris, Brazoria, Montgomery, Galveston, Fort Bend, Grimes, Waller, and Chambers.

EXCLUDED: Store managers, two assistant store managers per store, management trainees, meat department managers, all meat department employees working solely and exclusively in the meat department, office clerical employees who work separately and apart from the retail grocery stores, professional employees, guards, watchmen, and supervisors as defined in the Act.

At all times material, the Employer and the Respondent have maintained in effect and have enforced a series of collective-bargaining agreements, the most recent of which was effective by its terms for the period February 2, 1987, through June 24, 1990. The contract does not contain any provision requiring union membership, but permits employees to have the Employer deduct initiation fees and regular monthly dues³ from their wages and remit them to the Respondent.⁴

²These employees are Mario Chavarria, V. Jean Dopp, Irene Garcia, Rebecca Miley, Patricia Musgrove, Johnnie Norman, Novita Reimers, and Betty J. Wolf. The parties, however, have stipulated that the complaint allegations pertaining to V. Jean Dopp were resolved on a non-Board basis by the Respondent and the Charging Party and that Region 16 has agreed to that resolution.

³Union membership requires persons to pay union dues. Additionally, if a member ceases the payment of dues for the requisite period of time that person will lose their union membership in accordance with the procedures established in the Union's constitution and bylaws.

⁴Art. 3, sec. 3.01 of the parties' agreement provides:

During the life of this Agreement, the Employer shall deduct initiation fees and regular dues weekly from employees who individually and voluntarily certify in writing on the checkoff-authorization form for such deductions. Such authorizations shall be binding on the employees for the

Continued

¹ All dates are in 1989 unless otherwise indicated.

Dues-checkoff authorizations, which may be revoked, are used by the Respondent to collect monthly deductions from the employees of the Employer. In addition, expectancy of compliance with the revocation provisions contained in the authorization agreements themselves permits the Respondent to project income and budget expenses.

On the dates set opposite their respective names, each of the following named employees executed a checkoff authorization form⁵ authorizing the Employer to deduct "initiation fee(s)" and "regular monthly dues" or "Union dues" from their wages and remit them to the Respondent:

Mario Chavarria—June 15, 1986

Irene Garcia—August 18, 1987

duration of this Agreement unless the authorization is revoked in accordance with the provisions of the Taft-Hartley Act of 1947, as amended. No deductions shall be discontinued until the Employer has verified through the Union that the employee's request for revocation is timely and proper. The Union shall certify in writing a list of its new members, together with signed authorization cards with an itemized list of such initiation fees and dues to be deducted from such members. The Employer shall promptly remit all sums deducted in this manner to the Union monthly. Timing for such deductions may be worked out locally between the Employer and the Union.

⁵The checkoff authorization form executed by all the employees involved, except Irene Garcia, reads as follows:

I, _____ hereby voluntarily authorize *Gerlands*, in the State of Texas, to deduct my initiation fee, and regular monthly dues as duly established from time to time by United Food & Commercial Union, Local No. 455, United Food & Commercial Workers International Union, AFL-CIO, CLU, from my pay check on the _____ week of each month in advance, and deliver such initiation fees and dues to the aforementioned Local No. 455.

This authorization shall continue in effect for the term of the contract between the Employer, and the Union, or one year, whichever occurs sooner, and shall continue in effect for successive periods of one year unless revoked in writing by the undersigned to the Employer and the Union, within fifteen (15) days prior to the expiration of each term of one year or prior to the termination of the Agreement, whichever occurs sooner.

It is understood that the Employer's responsibility for the performance of this service is strictly limited to the delivery of such dues and initiation fees to the UFCW Local Union No. 455.

Signed: _____ Store No. _____
Address: _____ City _____
Employee Number: _____ Full Time _____ Part Time _____
Date _____ Initiation Fee _____ W.D.C. _____ Dues
per Month \$ _____ Reinstatement Fee \$ _____

The checkoff authorization form executed by Garcia reads as follows:

TO: Any Employer Under Contract with United Food & Commercial Workers Union, Local 455, AFL-CIO

You are hereby authorized and directed to deduct from my wages, commencing with the next payroll period, all Union dues and initiation fees as shall be certified by the Secretary-Treasurer of Local 455 of the United Food & Commercial Workers International Union, AFL-CIO, and to remit same to said Secretary-Treasurer.

This authorization and assignment shall be irrevocable for a period of one year from the date of execution or until the termination date of the agreement between the Employer and Local 455, whichever occurs sooner, and from year to year thereafter unless not less than thirty (30) days and not more than forty five (45) days prior to the end of any subsequent yearly period I give the Employer and the Union written notice of revocation bearing my signature thereto.

The Secretary-Treasurer of Local 455 is authorized to deposit this authorization with any Employer under contract with Local 455, and is further authorized to transfer this authorization to any other Employer under contract with Local 455 in the event I should change employment.

Date of hire _____ Date _____ Member's Signature _____

Social Security No. _____ Please Print Name _____

Rebecca Miley—April 18, 1986

Patricia Musgrove—April 29, 1986

Johnnie Norman—January 21, 1986

Novita Reimers—October 22, 1985

Betty J. Wolf—April 17, 1980

Each of these employees sought to resign union membership and/or requested that the Respondent and the Employer cease the previously authorized wage deductions. None of these requests for dues cancellations were timely under the terms of the dues-checkoff authorization agreements previously executed by the employees discussed above. The Respondent received these requests on or about the dates set opposite their respective names:

Mario Chavarria—March 17

Irene Garcia—March 27

Rebecca Miley—March 1

Patricia Musgrove—March 6

Johnnie Norman—March 1

Novita Reimers—February 25

Betty J. Wolf—February 25

By identical letters transmitted during the period of February 27 through March 27, the Respondent notified these employees that their requests for withdrawal of union membership were accepted, but that the Respondent considered untimely their requests to revoke their checkoff authorizations untimely.⁶ Commencing about March 13, the Respondent was advised that in light of these revocation requests the Employer was refusing to deduct union dues from the payroll checks of these employees.⁷ Since about March 21, the Respondent has demanded, both orally and in writing, that the Employer continue to deduct union dues from the wages of these employees and remit the moneys to the Respondent.⁸

⁶According to the Respondent, these requests to revoke dues-checkoff authorizations were untimely because they were not "made in writing within fifteen (15) days prior to the effective date of execution or fifteen (15) days prior to the termination date of the agreement between the Employer and Local 455, whichever occur[red] sooner."

⁷The Respondent, however, did not receive the Employer's letter concerning Irene Garcia.

⁸On March 21, the Respondent filed a grievance alleging that the Employer had violated the parties' collective-bargaining agreement by ceasing dues checkoff for these employees. The grievance was arbitrated on December 7. According to the General Counsel's letter to the Board dated June 12, 1990, the arbitrator issued his award on December 8 and found that the Employer has violated sec. 3.01 of the parties' agreement when it discontinued checkoff for employees Reimers, Wolf, Norman, Musgrove, Miley, Chavarria, and Garcia. The arbitrator ordered a make-whole remedy plus interest. Thereafter, on December 28, the Employer filed a complaint for interpleader and declaratory relief in the United States District Court, Southern District of Texas. On January 24, 1990, the Respondent filed its answer and a counterclaim in this matter. On February 15, 1990, the Employer filed its answer to the Respondent's counterclaim. To date, no other court action has occurred. We note that none of the parties seek Board deferral of the instant unfair labor practice case to the arbitrator's award.

In addition, on April 19, the Respondent filed an unfair labor practice charge in connection with the Employer's refusal to deduct these union dues and remit them to the Respondent. The charge was dismissed by the Regional

Since about March 27, although acknowledging receipt of the above requests, the Respondent has refused to cancel these employees' checkoff authorizations, but has granted their requests to resign their union membership. The Respondent has not requested that the employment status of any of these employees be affected.⁹

Thereafter, by letter dated March 29, and without informing the Respondent, the Employer notified the employees, except Johnnie Norman who was promoted to management on or about March 27, that it would continue to deduct dues from their payroll checks, but place the funds in a special escrow account, and not turn them over to the Respondent, while the instant case was being litigated.

B. Contentions of the Parties

The General Counsel offers three alternative theories on which to base a violation of Section 8(b)(1)(A) and (2). First, applying the principles of *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985), the General Counsel contends that the Respondent's refusal to recognize its members' revocations of their dues-checkoff authorizations was an unlawful restriction on their Section 7 right to resign union membership. Second, the General Counsel urges the adoption of the view taken by former Member Johansen in *Postal Service (Dalton)*, 279 NLRB 40, 42 (1986), enf. denied 827 F.2d 548 (9th Cir. 1987). Under that view, the General Counsel submits that even if these employees' requests to revoke their dues-checkoff authorizations were untimely, as claimed by the Respondent, their resignations from membership, which the Respondent admittedly accepted, reduced their dues obligations to zero. Thus, according to this theory, the Respondent violated the Act by attempting to cause the Employer to deduct from these employees' paychecks amounts greater than zero. Finally, the General Counsel contends that the Respondent's conduct was unlawful under the "quid pro quo" analysis of *Machinists Local 2045 (Eagle Signal)*, 268 NLRB 635, 637 (1984), discussed below.

The Employer contends that the checkoff-authorization forms executed by the employees involved were revoked by operation of law on their resignations from the Union. Consistent with the General Counsel's third alternative theory, the Employer's argument relies primarily on the "quid pro quo" analysis of *Eagle Signal*.

The Respondent defends its action on the basis that it could lawfully insist on the continued collection of dues from the Employer because the employees had untimely requested that their checkoff authorizations

be revoked. In this regard, the Respondent urges that the Board reject *Eagle Signal* and instead adopt the principle that, in the absence of a union-security clause, a checkoff authorization voluntarily signed by an employee is irrevocable except according to the terms of, and at the intervals stated by, the authorization agreement itself. In the alternative, if the Board continues to apply the analysis of *Eagle Signal*, the Respondent urges the Board to find that the language of the checkoff authorizations at issue does not show that the authorizations themselves made payment of dues a quid pro quo for union membership. Thus, the Respondent takes the position that, even applying *Eagle Signal*, it acted lawfully in rejecting the employees' revocation requests.

C. Discussion

In *Electrical Workers IBEW Local 2088 (Lockheed Space Operations)*,¹⁰ the Board acknowledged judicial criticism of the *Eagle Signal* analysis¹¹ and set forth a new test for determining the effect of an employee's resignation from union membership on that employee's dues-checkoff authorization. The Board in *Lockheed* found that an employee may voluntarily agree to continue paying dues pursuant to a checkoff authorization even after resignation of union membership. In fashioning a test to determine whether an employee has in fact agreed to do so, the Board recognized the fundamental policies under the Act guaranteeing employees the right to refrain from belonging to and assisting a union, as well as the principle set forth by the Supreme Court that waiver of such statutory rights must be clear and unmistakable.¹² In order to give full effect to these fundamental labor policies, the Board stated that it would:

construe language relating to a checkoff authorization's irrevocability—i.e., language specifying an irrevocable duration for either 1 year from the date of the authorization's execution or on the expiration of the existing collective-bargaining agreement—as pertaining only to the *method* by which dues payments will be made *so long as dues payments are properly owing*. We shall not read it as, by itself, a promise to pay dues beyond the term in which an employee is liable for dues on some other basis. Explicit language within the checkoff authorization clearly setting forth an obligation to pay dues even in the absence of union membership will be required to establish that the employee had bound himself or herself to pay

Director, and this dismissal was subsequently upheld on appeal to the General Counsel.

⁹The parties stipulated that no such action would be required because the parties' collective-bargaining agreement does not contain any provision mandating that employees be a union member and pay union dues.

¹⁰302 NLRB 322 (1991).

¹¹See *NLRB v. Postal Service*, 833 F.2d 1195 (6th Cir. 1987); *NLRB v. Postal Service*, 827 F.2d 548 (9th Cir. 1987).

¹²*Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

dues even after resignation of membership. [Id. at 328–329.]¹³

Applying the analysis of *Lockheed* to the stipulated facts in this case, we find that the Respondent has failed to show that the dues checkoff authorizations the seven employees signed obligated them to pay dues after they effectively resigned union membership. As in *Lockheed*, all that the seven employees here clearly agreed to do was to allow certain sums to be deducted from their wages and remitted to the Respondent for payment of their “initiation fee(s)” and “regular monthly dues” or “Union dues.” They did not clearly agree to have deductions made even after they had submitted their resignation from union membership. We thus find that these partial wage assignments made by Mario Chavarria, Irene Garcia, Rebecca Miley, Patricia Musgrove, Johnnie Norman, Novita Reimers, and Betty J. Wolf were conditioned on their union membership and were revoked when they ceased being union members. We therefore find that the Respondent’s refusal to accept these employees’ revocation requests and its repeated demands that the Employer continue to check off their membership dues, restrained and coerced these employees in the exercise of their Section 7 rights. Accordingly, we find that the Respondent violated Section 8(b)(1)(A) and (2) of the Act.

CONCLUSIONS OF LAW

1. By refusing to honor the revocation of dues-checkoff authorizations previously executed by Mario Chavarria, Irene Garcia, Rebecca Miley, Patricia Musgrove, Johnnie Norman, Novita Reimers, and Betty J. Wolf, after these employees resigned membership in the Union, where the terms of the voluntarily executed checkoff authorizations did not clearly and explicitly impose any postresignation dues obligation on the employees, the Respondent has restrained and coerced employees in the exercise of their Section 7 rights and has violated Section 8(b)(1)(A) of the Act.

2. By causing and/or attempting to cause the Employer, by virtue of dues-checkoff authorizations that do not clearly and explicitly impose any postresignation dues obligations on the employees, to continue to honor dues-checkoff authorizations from employees who have resigned union membership, the Respondent has violated Section 8(b)(2) of the Act.

REMEDY

Having found that the Respondent has engaged in the unfair labor practices described above, we shall order it to cease and desist and to take certain affirma-

tive action designed to effectuate the policies of the Act.

The Respondent must give full force and effect to the employees’ revocation of their checkoff authorizations. The Respondent shall also make employees Chavarria, Garcia, Miley, Musgrove, Norman, Reimers, and Wolf whole for any moneys deducted from their wages for the period following their union membership resignations, except to the extent those funds were withheld and placed by the Employer in a special escrow account, with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, United Food And Commercial Workers Local Union No. 455, AFL–CIO, Houston, Texas, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Refusing to honor any employee’s revocation of dues-checkoff authorization after the employee has resigned membership in the Union, where the terms of the voluntarily executed checkoff authorization do not clearly and explicitly impose any postresignation dues obligation on the employee and where there is no valid union-security clause in effect.

(b) Causing and/or attempting to cause the Employer, by virtue of a dues-checkoff authorization that does not clearly and explicitly impose any postresignation dues obligation on the employee, to continue to deduct union membership dues from the wages of any employee who has resigned union membership.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole employees Mario Chavarria, Irene Garcia, Rebecca Miley, Patricia Musgrove, Johnnie Norman, Novita Reimers, and Betty J. Wolf for any moneys deducted from their wages for the period following their resignations from union membership except to the extent those funds were withheld and placed by the Employer in a special escrow account, with interest as set forth in the remedy section of this decision.

(b) Post at its offices and meeting halls in Houston, Texas, copies of the attached notice marked “Appendix.”¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by

¹³In *Lockheed*, the Board left open the question of how its waiver rule would apply in the context of a lawful union-security provision. In the absence of a union-security clause requiring union membership here, the *Lockheed* test is applicable to this case.

¹⁴If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Sign and return to the Regional Director sufficient copies of the notice for posting by the Employer, if willing, at all places where notices to employees are customarily posted.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to honor any employee's revocation of his dues-checkoff authorization after the employee has resigned membership in the Union, where

the terms of the voluntarily executed checkoff authorization do not clearly and explicitly impose any dues obligation on the employee and where there is no valid union-security clause in effect.

WE WILL NOT cause and/or attempt to cause, Gerland's Food Fair, Inc.; Gerland's Food Fair, Inc. d/b/a Gerland's Realty, Inc.; and Gerland's Food Pantry, Inc., by virtue of a dues-checkoff authorization that does not clearly and explicitly impose any postresignation dues obligation on the employee, to deduct union membership dues from the wages of any employee who has resigned union membership.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole employees Mario Chavarria, Irene Garcia, Rebecca Miley, Patricia Musgrove, Johnnie Norman, Novita Reimers, and Betty J. Wolf for any moneys deducted from their wages for the period following their resignations from union membership, except to the extent those funds were withheld and placed by the Employer in a special escrow account, with interest.

UNITED FOOD AND COMMERCIAL
WORKERS LOCAL UNION NO. 455,
AFL-CIO